BANK OF TOKYO LTD.

v.

R. GNANASURIAN

HIGH COURT MALAYA, KUALA LUMPUR
SITI NORMA YAAKOB J
[SUIT NO. 23-3914-87]
4 MAY 1989

CIVIL PROCEDURE: *Setting aside judgment in default - Application to set aside judgment in default filed 8 months after judgment - Grounds of application were: (1) the present suit cannot be maintained as earlier suit on same cause of action not withdrawn at date of filing present suit (2) guarantee limited to very much less than loan granted to principal borrower - Whether guarantee is illegal - (Words read to limit to RM118 only although figure is RM118,000 immediately after written words) (3) as loan secured by charge, plaintiff should proceed against charge and not guarantee - Creditor choose to enforce guarantee - Whether creditor at liberty to choose which of two securities, charge or guarantee.*

The defendant applied to set aside the judgment in default entered against him on 15 January 1986 by filing an application 8 months after the judgment pursuant to a letter of guarantee dated 6 October 1982. The plaintiff commenced an action against the defendant and 2 other defendants, being the principal borrowers by filing civil suit no. 23-573-87 on 19 February 1987. Whilst that suit was still pending, the plaintiff filed a second suit, being the present suit against the defendant on 10 December 1987 solely on the same cause of action as the first suit 6 days later on 16 December 1987, the plaintiff served a notice of discontinuance against the defendant and the principal borrowers in the first suit.

The defendant raised the following issues in his application to set aside the judgment in default: (1) the present suit cannot be maintained as an earlier suit based on the same cause of action had not been withdrawn at the date of filing of this present suit and hence, he had been misled into thinking that the notice of discontinuance also referred to this present suit and consequently, he had not taken any action to defend this suit (2) as the guarantee is limited to very much less than the loan granted to the principal borrowers, the guarantee is illegal (3) as the loan is also secured by a charge, the plaintiff should proceed against the charge and not on the guarantee.

Held:

[1] The Court did not consider that the timing of the filing of the notice of discontinuance on 16 December 1987 in respect of the earlier suit and the filing of the second suit on 10 December 1987 can be taken against the plaintiff as the plaintiff's action after this present action was filed had not prejudiced the defendant in any way.

[2] As the defendant had never disputed his liability after the notice of demand was sent to him in May 1986 and on the defendant's own evidence, one of the principal borrowers has admitted the principal sum due with interest in a letter dated 4 August 1988 and since payment for this sum has been guaranteed by the defendant, there is no way in which the defendant as a guarantor can escape liability.

[3] In words the guarantee has been expressed to be limited to RM118 only, although the figure, RM118,000 appears immediately after the written words and as all surrounding factors must be taken into consideration when construing a guarantee and since in this case, the loan advanced by the plaintiff to the principal borrowers amounted to RM118,000 and the same figure is stated in the guarantee, it can only be that this guarantee is limited to RM118,000 and not to the nominal sum of RM118 as the defendant makes it out to be.

[4] As creditors, the plaintiff are at liberty to choose which of two securities they wish to enforce and the fact that the plaintiff chose not to foreclose the charge cannot provide the defendant with a defence to this suit.

[5] The defendant's application to set aside the judgment in default is dismissed with costs as there were no merits disclosed by the defendant.

[Application to set aside judgment in default dismissed with costs.]

For the defendant/applicant - T. Jayadeva; M/s. Syarikat Radhakrishnan
For the plaintiff/respondent - Thiagarajah; M/s. Hamzah Abu Samah & Partners

JUDGMENT

Siti Norma Yaakob J:

On 15 January 1988, judgment in default of appearance was entered against the defendant, who is sued as a guarantor pursuant to a letter of guarantee dated 6 October 1982. In his application to have the judgment in default set aside, filed 8 months after the judgment, the defendant raised the following issues.

1. The present suit cannot be maintained as an earlier suit based on the same cause of action had not been withdrawn at the date of filing of this present suit.
2. As the guarantee is limited to very much less than the loan granted to the principal borrowers, the guarantee is illegal.
3. As the loan is also secured by a charge, the plaintiff should proceed against the charge and not on the guarantee.

From the affidavits, it is clear that the plaintiff commenced legal proceedings against the defendant by filing CS 23-573-87 on 19 February 1987. Apart from the defendant, the plaintiff also cited 2 other defendants, they being the principal borrowers, and whilst that suit was still pending, the plaintiff filed a second suit, this present action on 10 December 1987 against the defendant solely on the same cause of action as the first suit. Six days later on 16 December 1987, the plaintiff served a notice of discontinuance against the defendant and the principal borrowers in the first suit and by so doing, had misled the defendant into thinking that the notice of discontinuance also referred to this present suit and hence had not taken any action to defend this action. The defendant also contends that the first action should have been discontinued first before the present action was filed. Since this was not done the present action cannot be maintained against him and consequently the judgment in default is irregular.

If one looks at the notice of discontinuance which is exhibited, to the defendant's affidavit, it is clear that as far as the defendant is concerned, it is only CS 32-573-87 that had been discontinued. There cannot be any question of mistake on the notice as there are 3 defendants cited in the notice and it cannot possibly relate to this present action where the

plaintiff has chosen to sue the defendant alone on his guarantee. The plaintiff have also explained that they had to discontinue the first action as the amount claimed against the defendant was incorrect.

As to whether the notice of continuance should have been filed before the plaintiff proceeded to file this present action, I do not consider that the timing of the filing of the notice and the second writ can be taken against the plaintiff. What is more important is whether the plaintiff's action after this present action was filed, had prejudiced the defendant in any way. I answer this in the negative as the defendant had never disputed his liability after the notice of demand was sent to him in May 1986. Moreover on the defendant's own evidence, one of the principal borrowers has admitted the principal sum due with interests, in a letter dated 4 August 1988 and since payment for this sum has been guaranteed by the defendant, there is no way in which the defendant as a guarantor can escape liability.

In words the guarantee has been expressed to be limited to RM118 only, although the figure, RM118,000 appears immediately after the written words. When construing a guarantee all surrounding factors must be taken into consideration and since in this case the loan advanced by the plaintiff to the principal borrowers amounted to RM118,000 and the same figure is stated in the guarantee, it can only be that this guarantee is limited to RM118,000 and not to the nominal sum of RM118 as the defendant makes it out to be.

The guarantee in this case may not well be the principal security for the loan. As it is there is also a charge created in favour of the plaintiff but the presence of these 2 securities does not mean that the charge must be realised first before the plaintiff can proceed against the defendant personally on the guarantee. As creditors, the plaintiff are at liberty to choose which of two securities they wish to enforce and the fact that the plaintiff chose not to foreclose the charge cannot provide the defendant with a defence to this suit.

As there were no merits disclosed by the defendant, I had accordingly dismissed his application to have the judgment in default set aside with costs.

Also found at [1989] 2 CLJ 1275